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August 3, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Via Hand Delivery

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

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Re: MM Docket No. 93-136
Reply to Motion to Dismiss

Dear Mr. Caton:

WSUV, Inc., GGG Broadcasting, Inc. and Palm Beach Radio Broadcasting, Inc., by their respective attorneys, hereby file an original and four copies of their Reply to Motion to Dismiss in the above-referenced proceeding.

Please direct any questions concerning this matter to the undersigned.

Sincerely yours,


David G. O'Neil

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Enclosures (5)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of Section 73.202(b))	
FM Table of Allotments)	MM Docket No. 93-136
Clewiston, Fort Myers Villas,)	
Indiantown, Jupiter, Key Colony)	RM-8161, RM-8309, RM-8310
Beach, Key Largo, Marathon and)	
Naples, Florida)	DOCKET FILE COPY ORIGINAL

REPLY TO MOTION TO DISMISS

Palm Beach Radio Broadcasting, Inc., licensee of WPBZ(FM), Indiantown, Florida; WSUV, Inc., licensee of WROC(FM), Fort Myers Villas, Florida; and GGG Broadcasting, Inc., licensee of WJBW(FM), Jupiter, Florida (collectively, "Joint Petitioners") hereby file their Opposition to the Motion to Dismiss, Or Alternatively, Opposition to Motion For Stay filed by Spanish Broadcasting Systems of Florida, Inc. ("SBSF"). SBSF has failed to state a basis for dismissing as moot the Joint Petitioner's Motion for Stay ("Motion") in this proceeding. Nor has SBSF rebutted the Joint Petitioner's showing that they are entitled to a stay. In support thereof, the following is hereby shown:

1. On July 20, 1995, the Joint Petitioners filed an Application for Review ("Application") of the Memorandum Opinion and Order, DA 95-1250 (Chief, Policy and Rules Division) (released June 14, 1995) ("MO&O") in this proceeding. The Application seeks reversal of the Allocation Branch's decision in the MO&O, denying the Joint Petitioners' Joint Counterproposal in this proceeding. The Joint Counterproposal permits each party requesting an upgrade

of their facilities in this proceeding to receive an upgrade. The Joint Counterproposal also eliminates alleged Receiver Induced Third Order Intermodulation ("RITOI") interference between WZMQ(FM), Key Largo, Florida and WCTH(FM), Plantation Key, Florida.

2. Concurrent with the Application, Joint Petitioners filed a Motion for Stay of the MO&O. Joint Petitioners showed that they satisfied the conditions for granting the Motion. SBSF challenges the Motion, arguing that the Commission should dismiss the Motion as moot because the filing of an Application for Review automatically stays any decision in a rule making proceeding. Alternatively, SBSF argues that Joint Petitioners have not made the necessary showing for granting a stay. SBSF is incorrect on both counts.

3. The Motion is not rendered moot by the Commission's statement in the Notice of Proposed Rule Making in MM Docket No. 95-110, FCC 95-277 (released July 21, 1995) ("NPRM"), that the filing of any appeal in a rule making proceeding proposing amendments to Section 73.202(b) of the Commission's Rules automatically stays the proceeding. In the event the Commission issues a decision affirming its tentative conclusions in the NPRM to eliminate the automatic stay provisions, the Commission must consider the Motion on its merits. If the Commission were to dismiss the Motion as moot because of the current automatic stay

provisions, the Joint Petitioners would have to resubmit the Motion for Stay.¹ The public interest disfavors such redundancies.

4. SBSF's Motion to Dismiss fails to provide any substantive arguments to justify denying the Motion. Instead, SBSF offers only unsupported conclusory statements and allegations. In response to SBSF's allegations, the Joint Petitioners direct the Commission to the compelling showing, both in the Joint Petitioners' Motion and in their Application, that the Commission failed to apply the same processing standards for counterproposals in rule making proceedings to the Joint Counterproposal in this proceeding in violation of Melody Music, 345 F.2d 730 (D.C. Cir. 1965). In addition, the Joint Petitioners showed that the Commission erred in not considering alternative tower sites for WROC(FM). Finally, SBSF continues to fail to provide any substantive proof of RITOI interference and therefore fails to provide evidence of irreparable harm to SBSF or WZMQ(FM) in the event the Commission grants the Motion for Stay.

5. Joint Petitioners in their Motion provided a clear and compelling showing that the Commission does not apply a "letter perfect standard" when processing proposals in rule making

¹ Had the Joint Petitioners failed to file their Motion for Stay at this time and the Commission subsequently issued a decision in MM Docket No. 95-110 ruling that an Application for Review amending Section 73.202(b) does not result in an automatic stay, SBSF no doubt would have opposed the future Motion for Stay as untimely. In order to protect the Joint Petitioners' procedural rights, therefore, the Commission cannot dismiss the Motion for Stay as moot at this time.

proceedings. The Commission repeatedly has permitted proponents in rule making proceedings to cure procedural defects via supplemental pleadings. However, in this proceeding, the Allocations Branch did not permit the Joint Petitioners to cure an alleged deficiency in their Joint Counterproposal.

6. SBSF does not refute this point in its Opposition. Instead, SBSF tortures the Commission's decision in one case cited by Joint Petitioners, Mary Esther, Florida, 7 FCC Rcd 1417 (Chief, Allocations Branch) (1991), to reach a contrary conclusion for the term "on the record". As the Joint Petitioners stated in their Motion and Application, any reasonable interpretation of the phrase "on the record" as discussed in Mary Esther and the facts of that particular case leads to the logical conclusion that a proponent in a rule making proceeding may cure a procedural defect in its proposal before the record closes. In the instant case, the Joint Petitioners cured any alleged procedural defect prior to the record being closed. Consequently, the Allocations Branch erred in not considering the Joint Counterproposal on its merits.

7. Joint Petitioners further showed that the Commission failed to consider alternative tower sites for WROC(FM), instead ruling on the unsuitability of the tower site even though the Joint Petitioners relied upon the Commission's official database in selecting reference coordinates for WROC(FM). Instead of considering alternative tower sites recommended by the Joint Petitioners, the Allocations Branch incorrectly denied the Joint Counterproposal. Joint Petitioners submit that the Commission's

failure to consider alternative reference coordinates for WROC(FM) constitutes reversible error.

8. Finally, the Joint Petitioners again bring to the Commission's attention the fact that SBSF has failed to provide any showing of actual RITOI interference. SBSF's claims that third parties are concerned about potential RITOI interference are undermined by the absence of any complaints. In this regard, it cannot be emphasized enough that although this rule making proceeding is over two years old, and presumably the alleged RITOI interference occurred for some time prior to this rule making proceeding, not one complaint of RITOI has been brought to the Commission's attention, especially from residents of Plantation Keys or customers of Florida Keys Electrical Cooperative Association, Inc. Not one complaint! The Joint Petitioners have demonstrated overwhelmingly the absence of any harm, let alone substantial harm, to SBSF by granting the motion.²

9. Moreover, as the Joint Petitioners stated in their Motion and Application, SBSF can resolve the RITOI problem by changing transmitter sites for WZMQ(FM) as SBSF proposes in this proceeding with no need to change channels. SBSF may either operate WZMQ(FM) on its current channel from the new transmitter site or change

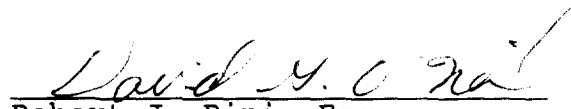
² Equally surprising is that the proponent for eliminating the alleged RITOI interference is SBSF, the licensee of WZMQ(FM), and not the licensee of WCTH(FM), the station that supposedly suffers from the alleged RITOI interference. If the RITOI interference is as substantial as SBSF claims, then WCTH(FM) presumably would take action on its own initiative to resolve this problem. The silence of WCTH(FM) is not surprising if there have been no complaints of RITOI interference.

channels to the channel proposed in the Joint Counterproposal. Despite its alleged concern over the RITOI interference and its immediate impact, SBSF continues to oppose the Joint Counterproposal. Such false concern on the part of SBSF over RITOI interference should not be countenanced.

WHEREFORE, for the foregoing reasons, Palm Beach Radio Broadcasting, Inc., WSUV, Inc. and GGG Broadcasting, Inc. request that the Commission should grant their Motion for Stay and deny Spanish Broadcasting System of Florida, Inc.'s Opposition.

Respectfully submitted,

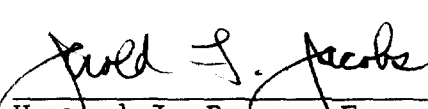
**WSUV, INC.
GGG BROADCASTING, INC.**


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August 3, 1995

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CERTIFICATE OF SERVICE

I, Rhonda R. Parrish, a secretary with the law firm of Rini & Coran, do hereby certify that I caused a copy of the foregoing "Reply to Motion to Dismiss" to be mailed, first-class, postage prepaid, this 3rd day of August, 1995 to the following:

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